In the present case Kay's evidence (Notes of Evidence – 274 C) is that he did not know about the winding up petition until January 26, 1979 and there is no other evidence to the contrary. In fact he is supported by Choh Yet's evidence (Notes of Evidence 2168) who said that he informed Kay of the winding-up petition after he saw the newspaper advertisement of the same date.

In these circumstances I find that the 1st defendant did not have knowledge of the winding up petition of the 1st plaintiff company when it took the transfers of the estate in November, 1978 and it is entitled to the validation order sought. There is no bad faith or dishonest intention proved against the 1st defendant.

My findings in these issues are:-

A) The registered owners of the 2nd and 3rd portions of the estate held the properties upon trust for the 1st plaintiff at all material times before November 1978.

B) The transfers of the 1st, 2nd and 3rd portions of the estate to the 1st defendant are:-

(i) not void by reason of section 53 of the Bankruptcy Act 1967;

(ii) void for the purpose of section 223 of the Companies Act 1965 but now validated.

C) Section 53B of the Bankruptcy Act 1967 (as amended) does not apply to the proceeds of sale in view that the transfers were not avoided by reason of section 53 of the Act in the result that the 2nd plaintiff is not entitled to recover:-

a) from the first defendant the proceeds of the sale to the second defendant in March 1979;

b) from the 2nd defendant the proceeds of the sale to the third defendant in July 1979.

D) It is not proved by the plaintiffs that equity ought to set aside the transfers of the 1st, 2nd and 3rd portion of the estate to the 1st defendant.

E) This issue has been abandoned.

F) The 1st plaintiff is still owing the 1st defendant the amount of monies adjudged in Originating Summons No. 83/1975 now secured on the proceeds of sale of the estate.

G) The 1st plaintiff is entitled to recover damages:-

(i) for breach of trust from the 4th defendant;

(ii) not entitled to recover from the 5th defendant.

In the result, it is my judgment that all the claims against the 1st, 2nd and 5th defendants be dismissed with costs.

There will be judgment for the plaintiffs as prayed against the 4th defendant and an order that damages against the 4th defendant be assessed with costs. Both costs to be taxed.

Before leaving this case I wish to record my appreciation to all the counsel concerned especially to Mr. Chadwick and Mr. Rattee who have pleaded their cases before the Court clearly and argued them exhaustively. Their assistance in tracing relevant exhibits from the volumes of documents placed before the Court is commendable without which help the proceedings would have consumed more time.

Order accordingly.

Solicitors: *Skrine & Co.; Adnan Sundra & Low; Ho Thian Cheh & Co.; Nijar & Nijar; Jackson & Masacorale.*

KARPAL SINGH v. ATTORNEY-GENERAL, MALAYSIA

[O.C.J. (Mustapha Hussain J.) February 6, 1986]

[Alor Setar – Originating Summons No. 421 of 1984]

Criminal Law and Procedure – Cautioned Statement – Recording of – Whether before or after arrest – Criminal Procedure Code (F.M.S. Cap. 6), ss. 112 & 113(1)(a)(ii).

The Democratic Action Party organised a walkathon at Alor Setar. The plaintiff was a leader of the party. The walkathon was held on October 20, 1984 without a police permit. As a result the walkathon was broken up by the police. Some people were arrested but not the plaintiff. The plaintiff was later asked to make a cautioned statement under section 113 (1) (a) (ii) of the Criminal Procedure Code. The plaintiff refused and as he had no one to turn to he sought redress in the High Court by filing an originating summons seeking a declaration that the police could only record a cautioned statement from him under the provisions of section 113 (1) (a) (ii) of the Criminal

Procedure Code after his arrest and not before arrest. The defendant applied by a Summons-in-Chambers to set aside the Originating Summons on the grounds that the plaintiff's action disclosed no reasonable cause of action, that the relief sought was purely academic and/or premature, that the institution by way of originating summons was misconceived, frivolous, vexatious and an abuse of the power of court.

Held, dismissing the defendant's application: (1) the plaintiff has the right to seek the aid of the Court;

(2) the police could only take a cautioned statement from the plaintiff after he had been arrested.

[*Editorial note:* On appeal by the Attorney-General to the Supreme Court (Abdul Hamid C.J. (Malaya), Mohamed Azmi & Abdoolcader S.C. JJ., Supreme Court Civil Appeal No. 20 of 1986 – July 9, 1986), the Supreme Court ordered the appeal to be dismissed with costs].

Cases referred to:-

(1) *Tractors Malaysia Bhd.* v. *Tio Chee Hing* [1975] 2 M.L.J. 1, P.C.
(2) *Republic of Peru* v. *Peruvian Guano Co.* (1887) 36 Ch. D. 489, 496.
(3) *Low Yat* v. *Grace* [1947] M.L.J. 115.
(4) *Cadam & Ors.* v. *Beaverbrook Newspapers Ltd.* [1959] 1 Q.B. 413.

ORIGINATING SUMMONS.

Karpal Singh for the plaintiff.

Lim Beng Choon (Senior Federal Counsel) for the defendant.

Cur. Adv. Vult.

Mustapha Hussain J.: The plaintiff, Mr. Karpal Singh, filed this Originating Summons, seeking the declaration of the Court that the police can only record a cautioned statement from him under the provision of section 113 (1) (a) (ii) of the Criminal Procedure Code *after* his arrest and *not before arrest.*

The plaintiff filed this Originating Summons Enclosure (2) on December 26, 1984.

The events that gave rise to this application were, from the affidavits filed, which are not disputed by the defendant, as follows:-

The plaintiff, Mr. Karpal Singh, who is a famous lawyer, is also a leader of the Democratic Action Party, a vociferous opposition political party.

There was at the material time, a very hot political issue concerning Bukit China in Melaka where the plaintiff's party had taken issue with the authorities and as part of that campaign, probably in exercising the right to dissent (which is fundamental in a democracy), a walkathon was organised to start from Alor Setar on October 20, 1984. Apparently the police permit was not given but the walkathon nevertheless took place. The police broke up the walkathon while still in its infancy in Alor Setar town and some 18 persons were arrested by the police.

The plaintiff was not arrested. The 18 people who were arrested in the abortive walkathon were brought to the police station and were charged.

On December 1, 1984, some 40 or so days later, an Inspector Sudha of the Alor Setar police went to see the plaintiff in his office at Penang and requested the plaintiff to give a cautioned statement under section 113 (1) (a) (ii) of the Criminal Procedure Code, as directed by his superiors. Inspector Sudha was very courteous in going all the way from Alor Setar to Penang to try to get a cautioned statement, a courtesy which the police without doubt would have shown and given even if the plaintiff had not been a famous lawyer but merely a padi planter or a labourer. The plaintiff refused on the grounds that since he was never arrested, he need not give a cautioned statement, as the provision of section 113 (1) (a) (ii) has not arisen. He telephoned the Kedah State Legal Adviser who was of the view that he has to.

On December 3, 1984, the plaintiff wrote to the defendant, who is the Attorney-General, who replied saying that the plaintiff for his own interest should comply with the request of the police *i.e.* to make the statement under section 113 of the Criminal Procedure Code as required by the police.

As there was no one else to whom the plaintiff could turn to clarify the position, he sought redress in the High Court, the only avenue open to him. Hence, this Originating Summons which was filed on December 26, 1984.

Then, the defendant applied by a Summons-in-Chambers (Enclosure (8)) to set aside the Originating Summons on the grounds that the plaintiff's action disclosed no reasonable cause of action, that the relief sought is purely academic and/or premature, that the institution by way of Originating Summons is misconceived, frivolous, vexatious and an abuse of the power of the court, the usual standard formula used to set aside any pleading.

It is therefore necessary for the Court in order

to determine the defendant's application to set aside the plaintiff's Originating Summons (Enclosure (8)), to also consider the substantive application of the plaintiff in order to find out whether the application is misconceived, without cause of action, vexatious or an abuse of the power of the court.

On the Defendant's Application to Set Aside the Plaintiff's Originating Summons – Encl. (8).

The power to set aside any pleading is a drastic act: *Tractors Malaysia Bhd.* v. *Tio Chee Hing.*[1] It deprives a litigant and those coming to court to seek justice, a full hearing of his case. It can only be exercised in very rare cases where it is very very obvious that there is no cause of action at all *e.g.* the claim is clearly statute-barred (see *Republic of Peru* v. *Peruvian Guano Co.*[2]; *Low Yat* v. *Grace*[3]).

In our case here, the plaintiff is seeking a declaration from the court and it is contended he can only do so if his right is violated or will be violated. This is a serious issue of law to be adjudicated (see *Codam & Ors.* v. *Beaverbrook Newspapers Ltd.*[4]). What is this right? He had been asked by the police to give a cautioned statement which he strongly believed he should not do so as he was never arrested, *i.e.* the cautioned statement could only be taken from him after he had been arrested. The State Legal Adviser also said he must. The defendant, the highest Legal Officer in the country, said he should do so.

The plaintiff was in a dilemma. He had the police breathing down his neck. He firmly and strongly believed he was under no obligation to make the statement. The only avenue open to him was the High Court. Surely this is a right of the plaintiff to seek the aid of the court to clarify the position of the law to resolve this dilemma. Surely also, it is a right of the plaintiff not to do something which he is not obliged under the law to do. Anyone can come to court to seek relief and among other things, a declaration as to his right or obligation. He must be given the full opportunity of being heard so that justice is not only done but be seen to be done. And if after hearing, the court finds that the claim or relief sought is without cause of action, frivolous, vexatious and an abuse of the process of the court, then the court will punish him with costs.

Any attempt to narrow down the meaning of "right" or what amount of right that is being violated to enable him to come to court, and any attempt to block the only avenue open to those who seek justice will be viewed with askance by the court.

The Court therefore dismissed the defendant's application to set aside the Originating Summons.

On the Application for Declaration by the Plaintiff (Encl. (2)).

We have to look into and consider what section 113 of the Criminal Procedure Code is all about. Section 113 reads as follows:

"113 (1) Where any person is charged with any offence any statement, whether the statement amounts to a confession or not or is oral or in writing, made at any time, whether before or after the person is charged and whether in the course of a police investigation or not and whether or not wholly or partly in answer to questions, by that person to or in the hearing of any police officer of or above the rank of Inspector and whether or not interpreted to him by another police officer or other person shall be admissible in evidence at his trial and, if the person charged tenders himself as a witness, any such statement may be used in cross-examination and for the purpose of impeaching his credit:

Provided that –

(a) no such statement shall be admissible or used as aforesaid –

(i) if the making of the statement appears to the court to have been caused by any inducement, threat or promise having reference to the charge proceeding from a person in authority and sufficient in the opinion of the court to give the person charged grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceeding against him; or

(ii) in the case of a statement made by the person after his arrest, unless the court is satisfied that a caution was administered to him in the following words or words to the like effect:
"It is my duty to warn you that you are not obliged to say anything or to answer any question, but anything you say, whethef in answer to a question or not, may be given in evidence"; and

(b) a statement made by any person before there is time to caution him shall not be rendered inadmissible in evidence merely by reason of no such caution having been administered if it has been administered as soon as possible.

(2) Notwithstanding anything to the contrary contained in any written law a person accused of an offence to which subsection (1) applies shall not be bound to answer any question relating to the case after any such caution as aforesaid has been administered to him."

The subsection (1) itself speaks of *"any*

statement . . . . . shall be admissible in evidence at his trial" with the provisos that followed the subsection (1). It is clear that section 113 is concerned with the admissibility of statements and its usage in a trial of the person who made the statement; or so it would seem. (The material portions are emphasized). The marginal note to the section reads "Admission of statements in evidence."

The provision of when and how to take the statement, whether oral, written, with or without caution is to be found in the preceding section 112 of the Criminal Procedure Code, which reads:

"112. (i) A police officer making a police investigation under this Chapter may examine orally any person supposed to be acquainted with the facts and circumstances of the case and shall reduce into writing any statement made by the person so examined.

(ii) Such person shall be bound to answer all questions relating to such case put to him by such officer:

Provided that such person may refuse to answer any question the answer to which would have a tendency to expose him to a criminal charge or penalty or forfeiture.

(iii) A person making a statement under this section shall be legally bound to state the truth, whether or not such statement is made wholly or partly in answer to questions.

(iv) A police officer examining a person under subsection (i) shall first inform that person of the provisions of subsections (ii) and (iii).

(v) A statement made by any person under this section whether or not a *caution has been administered to him under section 113 (1)* shall, whenever possible, be taken down in writing and signed by the person making it or affixed with his thumb print as the case may be, after it has been read to him in the language in which he made it and after he has been given an opportunity to make any corrections he may wish." (the emphasis is mine)

The marginal note to section 112 says – "Examination of witnesses by police." Section 112 sets out the whole rigmarole of the mode of taking down statements of witnesses in the course of a police investigation.

However, looking carefully at the amended subsection (v) of section 112 where it states "A statement made by any person under this section *whether or not a caution has been administered to him under section 113 (1) shall,* whenever possible, be taken down in writing . . . . " The material words here are *"caution has been administered to him UNDER section 113 (1)."* The words are simple and clear (the emphasis is mine), and there is no ambiguity. It is beyond peradventure that the caution has to be administered under section 113 (1).

The legislature therefore had intended that the caution had to be administered under section 113 (1), making section 113 not only a section concerned with the question of admissibility but also concerned with the administering of caution.

Coming back to section 113 and reading subsection (1) (a) (ii) which reads "in the case of a statement made by the person *After* his arrest, unless the court is satisfied that a *caution was administered* to him . . . ", in the context of section 112 (v), it is very plain and obvious that a cautioned statement can only be taken after the person had been arrested.

Strangely enough, there are no legal provisions to enforce a person to give a statement to the police; there is no punitive clause to those who refused. The plaintiff, Mr. Karpal Singh could, if he wanted to, refuse to give the statements whether cautioned or not. As the learned Senior Federal Counsel for the defendant succinctly and correctly said in open court during the submissions, "Mr. Karpal Singh can tell the Attorney-General to go and fly kites, and the Attorney-General could do nothing about it ..." Presumably Mr. Karpal Singh, the plaintiff who is a famous lawyer and law abiding, had wanted to co-operate with the police and give a statement but not a cautioned statement. He had come to the court to seek a clarification on a point of law and for the reasons stated above, he is correct in his belief and the Court therefore made an order in terms of his application seeking a declaration that the police can only take a cautioned statement from him after he has been arrested, with costs to the plaintiff.

Order accordingly.

Solicitors: *Karpal Singh & Co.*